BANK KERJASAMA RAKYAT (M) BHD. & ANOR.

v.

DATUK HARUN HJ. IDRIS & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL SUIT NO. 2110 OF 1977]
7 MARCH 1987

CIVIL PROCEDURE: *Application to dismiss suit for want of prosecution - Principles to be applied - Lapse of eight years - Criminal proceedings instituted against applicant - Reliance on documentary evidence - Documents in the custody of police.*

There were separate applications by the first, second and fifth defendants to dismiss a suit brought by the plaintiffs in 1977 against them for want of prosecution. The plaintiff alleged that the first and second defendants had pledged shares owed by the first plaintiff to the fifth defendant for banking credit facilities to a third party. It was alleged that the defendants were *inter alia* in breach of trust. The grounds of the application were *inter alia* that the cause of action took place in 1975; the suit was filed in 1977 and the notice of trial was issued in 1978 under the old rules. The applicants contended that they were prejudiced by the inordinate delay as the third defendant had died, some witnesses could not be traced; the memory of the available witnesses were suspect; and the discovery of relevant documents had not begun and there would be further delay if there was discovery of documents at that stage.

The plaintiffs filed a notice of intention to proceed under O. 3 r. 6, Rules of the High Court, 1980 in 1985. The summons for directions was filed two months later and the hearing was adjourned. The application by the fifth defendant was issued on the same day as the summons for directions. The application by the first and second defendants were filed after that date but before the hearing of the summons for directions.

The respondents contended that they had filed a notice of intention to proceed in 1985, filed a summons for directions in 1985 and had made applications for attachment of property.

There were criminal proceedings against the applicants.

Held:

[1] There was a lapse of 8 years from date of the filing of the suit until the date of the application. The delay in filing the notice of intention to proceed the summons for directions was because the relevant documents were in the custody of the police during the criminal proceedings against the applicants. The respondents would rely mainly on documentary evidence to prove their case. The respondents had given a satisfactory explanation for the delay in proceeding with the suit.

[Applications dismissed with costs.]

Cases referred to:

Vasudevan v. Damodaran & Anor. [1981] CLJ (Rep) 101
Datuk Harun bin Haji Idris v. PP [1978] 1 MLJ 240
G. L. Baker Ltd. v. Medway Building and Supplies Ltd. [1958] 2 All ER 532
Toh Hock Thye & Ors. v. Toh Chwee Biow [1982] 1 MLJ 152

Legislation referred to:
Limitation Act 1953, s. 22(1)(a)
Limitation Act 1939 [UK] s. 19(1)(a)
Rules of the High Court 1980, O. 3 r. 6, O. 25 r. 1(1)

For the applicant/first defendant - R. R. Chelliah
For the applicant/second defendant - Raja Abdul Aziz Addruse (Zaitoon Dato Othman with him)
For the applicant/fifth defendant - C. Abraham
For the respondents/first and second plaintiffs - Mohd. Ismail bin Mohd. Shariff (Pushpa Nair with him)

JUDGMENT

KC Vohrah J:

The first, second and fifth defendants have applied to dismiss a suit brought by the plaintiffs in 1977 against them and two others for want of prosecution.

The suit came in the wake of the Ali-Bugner fight in 1975. The fourth defendant, Tinju Dunia Sdn. Bhd., had promoted the fight and suffered great financial loss.

On 5 July 1975, prior to the fight, the first plaintiff, Bank Rakyat Malaysia Bhd., owned 3 million ordinary shares in Dunlop Estates Bhd. and 1 million ringgit debenture stock of Kuala Lumpur Kepong Bhd.

Bank Raykat and the second plaintiff allege that on or about that day, 3 of its office holders - the first defendant (Datuk Harun, who was Chairman of Bank Rakyat), the second defendant (then the Managing Director of Bank Rakyat) and the third defendant (then the General Manager and Secretary of Bank Rakyat) - pledged and lodged with Citibank N.A., the fifth defendant, the said shares and KLK debenture stock owned by Bank Rakyat. This was done for the purpose of securing letters of credit and other banking facilities for Tinju Dunia which had an account with Citibank.

The plaintiffs allege that the first, second and third defendants pledged and lodged the said properties in breach of trust. Or that they did so in breach of fiduciary duties. Or that they did so in fraud of Bank Rakyat. All the three defendants deny these allegations.

In respect of the second and third defendants there is the further allegation that the said pledging and lodging were done in breach of their respective contracts of service with Bank Rakyat, which they deny.

Particulars of various acts in support of the allegations were pleaded.

The plaintiffs claim that the pleading and depositing of the shares and stock and other acts alleged in the particulars were also *ultra vires* the powers and objects of Bank Rakyat and that Citibank was aware or ought to have been aware of these matters. Citibank deny any knowledge of the alleged breaches and fraud and claim that Bank Rakyat was legally empowered to pledge or deposit the said shares and stocks and was bound by the acts of the first, second and third defendants.

The plaintiffs particularize that on various dates in 1975 and 1976 the first, second and third defendants or one of more of them paid or caused to be paid by Bank Rakyat to Tinju Dunia or on its behalf to other persons including Citibank directly or through the second plaintiffs, some sums of money. It was alleged that a major portion of these sums was paid to the account of Tinju Dunia with Citibank. And Bank Rakyat claims the sum of some RM7.7 million from the first, second and third defendants and the sum of RM7.4 million from Citibank.

So much for the nature of the suit. The second plaintiff went into receivership in 1982. The third defendant is dead.

The affidavits supporting the application for dismissal of the suit show as at 1 August 1985, when the fifth defendant made the application to dismiss the suit, the following -

(1) that the alleged cause of action against all 5 defendants arose some 10 years ago in 1975;

(2) that the writ with the statement of claim was about 8 years ago issued on 27 July 1977;

(3) that the statement of claim was amended on 2 August 1977;

(4) that the statement of defence of the first, second, third and fifth defendants were filed by 30 November 1977;

(5) that on 14 February 1978 a notice of trial was issued under the old rules;

(6) that the plaintiffs have not filed their affidavit of documents although notices were given in September, 1978;

(7) that on the other hand the first and fifth defendants have yet to file their affidavits of documents;

(8) that the plaintiffs filed further and better particulars on 15 March 1979.

The above matters are not disputed. In 1980 the plaintiffs obtained judgment in default against Tinju Dunia. Then on 7 June 1985 the plaintiffs filed notice of intention to proceed under O. 3 r. 6. About 2 months later, on 1 August 1985, a summons for direction (enclosure 167) filed by the plaintiffs, was issued by Senior Assistant Registrar of the Commercial Division of the High Court. The summons came up for hearing before the SAR on 20 September 1985 at which the first, second and fifth defendants were represented. The hearing was adjourned. The fifth defendant's application to strike out this action (enclosure 169), issued by the SAR of the Commercial Division, coincidentally was also issued on the same date as the plaintiffs' summons for direction on 1 August 1985. The applications by the first and second defendants were issued on 18 September 1985 and 13 September 1985 respectively.

The complaint by the defendant is that from 15 March 1979, when the plaintiffs filed further and better particulars, till 7 June 1985, when the plaintiffs filed notice of intention to proceed, the plaintiffs had been slumbering; they did not take any steps to prosecute the proceedings. They complain that the ensuing inordinate and inexcusable delay has given rise to a grave risk that a fair trial would no longer be possible and that grave injustice would result to the defendants. They have cited several cases and they rely on *Vasudevan v. Damodaran & Anor*. [1981] CLJ (Rep) 101 for the principles they think should be applied in this matter.

What does the complaint of serious prejudice to the defendants by the delay comprise? The first defendant averred that a material witness, the third defendant, has died and that employees of the plaintiff and some members of the Board of Directors of the First plaintiff at the relevant time who would have been his material witness are no longer with the first plaintiff and are difficult to trace. And he averred that after a lapse of 10 years the memory of available witnesses including himself will inevitably be suspect. The second defendant averred that "the recollection of the evidence and of related witnesses would be difficult if not impossible." The affidavit of the Assistant Vice-President of the fifth defendant averred that the discovery of relevant documents for its case had not begun because of the contumacy of the plaintiffs and the process for discovery would be extensive and time consuming and

would put the date of hearing further ahead. He also averred that one of the fifth defendant's principal witnesses left its employ in 1978 and it can no longer ensure the assistance or presence of this witness. The deponent further averred that with the delay "there would be grave difficulties about adducing available testimony as to the actions, knowledge or beliefs of those involved in the matter." Prejudice there is but in the context of the pleadings what has to be considered is that far more reliance will be placed on documentary evidence rather than oral evidence. I shall advert to this aspect later.

The plaintiffs dispute they were sleeping on the action. They point out that apart from the notice of intention to proceed on 7 June 1985 and the summons for directions on 1 August 1985 they had also taken a summons in November 1977 and obtained an order for the attachment before judgment of the properties of the second defendant. The second defendant then applied to set aside the order and it was turned down by the High Court after which an appeal was made to the then Federal Court. The appeal was disposed off only on 15 July 1982. The plaintiffs also point out that they made several applications under the attachment before judgment proceedings for various orders for the sale of properties subject to the attachment. However, to my mind, the attachment before judgment proceedings were subsidiary to the main action and do not affect the question of the present action going to trial. But regard has to be given to the notice of intention to proceed and the summons for directions; and I shall deal with these shortly.

A period of about 8 years ran from the date of the writ to the time the three defendants filed their summons to strike out the action against them. And if one adds the post writ period from the time the cause of action arose the delay is well nigh 10 years. The delay does appear inordinate when one ignores the notice of intention to proceed and the summons for directions and if there is nothing to indicate other earlier steps being taken. But in my view the Court has to take into account that before the date of filing of the application to dismiss made by the fifth defendant, although the application was filed on the same date as the plaintiff's summons for direction, the plaintiffs had already filed their notice of intention to proceed. The plaintiffs followed that up with a summons for directions which as an enclosure numbered "167" appears to have been filed earlier than the fifth defendant's application (enclosure 169). There was late filing of the notice of intention to proceed and the summons for directions but the reasons for their late filing have to be taken into account.

A large number of documents were taken by the police for criminal proceedings against the first, second and third defendants. Amongst, these documents are documents which relate to or are relevant to the matters in the action. The police did not return the documents. Consequently the plaintiffs were not able to file the affidavit of documents. The affidavit filed on behalf of the plaintiffs by the legal officer of the first plaintiff and the director of the second plaintiff, Zubir, states that he personally made several attempts to recover the documents from the police authorities to no avail save that on 7 November 1985 he was informed by them that "they are in possession of various documents related to the matter." It is true that the Federal Court by December 1977 in the case of *Datuk Harun bin Haji Idris v. PP* [1978] 1 MLJ 240 had disposed off the criminal proceedings against the first, second and third defendants and leave to appeal to the Privy Council was refused. Documents seized by the police could and should therefore have been released to the first plaintiff. But the fact remains that the documents were in the hands of a third party, not in the hands of the plaintiffs and that attempts indeed were made to recover them to no avail. It is not that the problems of filing the affidavit of documents is one of the plaintiffs' singularly - after all till today the fifth defendant itself has not filed its affidavit of documents as requested.

I think it is important that sufficient regard be given to the matter of the documents in the case. From the nature of the pleadings it is clear that in the main documents, not so much oral evidence, will be relied on as the basis for the plaintiffs' various allegations and as indeed for the rebuttal of such allegations by the defendants. On record is a supplemental affidvit of Zubir filed on 13 August 1986. Counsel for all three defendants had no objection to its use. Zubir deposed that he has since received all the relevant documents from the police and that the plaintiffs are in a position to file a complete list of documents. It may be premature to say that all the documents needed at the trial are now available but suffice it to say the main cause of delay for the trial - documents being in the hands of the police - no longer exists.

Then again the Court has to consider that the plaintiffs were also putting feelers for a settlement of the suit with the defendants since July 1984. When their efforts failed the plaintiffs instructed their solicitors to proceed with the case. Attempts at compromise for the purpose of avoiding trial are certainly to be encourged but it has been argued that the overtures by the plaintiffs were made so long after the pleadings had been closed and that therefore they cannot be considered as constituting good excuse for the delay in taking necessary steps in a Court of law to set the trial in motion. I would agree with this argument but the fact is that again this excuse cannot be viewed in isolation.

In other words what has to be considered, too, is that the plaintiffs did not comletely go to sleep until the defendants took out their applications to dismiss the suit for want of prosecution. The plaintiffs were certainly not lacking in activity altogether. It will be remembered that the plaintiffs furnished certain further and better particulars of the amended statement of claim in 1979 to the fifth defendant. In 1980 they obtained judgment by default against the fourth defendant. They could not supply the affidavit documents requested for but they did chivvy the police, a third party, to supply them with the documents to no avail. In 1984 they did take steps to communicate with the first, second, third and fifth defendants to bring about a settlement of the case. Then, according to the deponent of the affidavit sworn on 7 October 1985 on behalf of the plaintiffs, when the plaintiffs did not receive the documents from the police, the plaintiffs made a decision in view of the non-availability of the documents to proceed with the case. As indeed when it became clear that when "an out-of-court settlement could not be reached, the first plaintiff gave instructions to the plaintiff solicitors to proceed with the case." This was after the plaintiffs had again in March 1985 written in to one of the defendants for a substantive reply to plaintiffs' enquiry for a settlement. Accordingly, on 7 June 1985 the plaintiffs filed notice of intention to proceed and about 2 months later on 1 August 1985 they filed a summons for directions.

To my mind it is clear that the plaintiffs had not gone completely to sleep in the period preceding the applications of the first, second and fifth to dismiss the plaintiffs suit. Surely, it cannot be said that effect of the notice of intention to proceed coupled with the summons for directions taken shortly afterwards should be nought. These steps certainly were taken towards the prosecution of the case if taken tardily and not within the time frame envisaged under O. 25 r. 1(1). Directions have yet to be given as to the future course of the action as appear best adapted to serve the just, expeditious and economic disposal thereof. To my mind the plaintiffs should be allowed to pursue their summons for directions.

One other matter. The suit is also predicated, as pointed out earlier, on alleged fraud practised by the first, second and third defendants on Bank Rakyat in respect of properties owned by Bank Rakyat but entrusted with them. Accordingly, under s. 22(1)(a) of the Limitation Act 1953 no period of limitation applies to the action so far as they relate to the first, second

and third defendants. It is not alleged that the fifth defendants is a trustee of the said properties but it is pleaded that the fifth defendant should have been aware that the first, second and third defendants in fraud of Bank Rakyat had pledged and lodged the said properties with Bank Rakyat. And s. 22(1)(a) does not in terms refer to an action against trustees. It is to be noted that s. 22(2)(a) is in *pari materia* with s. 19(1)(a) of the English Limitation Act 1939 and the expression "fraud and fraudulent breach of trust" appearing in s. 19(1)(a) of the English Act has been held in *G.L. Baker Ltd. v. Medway Building and Supplies Ltd.* [1958] 2 All ER 532 to cover the case where an actioin is brought against an innocent party into whose hands the trust property had come. The case was reversed on another point (see [1958] 3 All ER 540). It would appear therefore that equally no period of limitation applies to the action in respect of the fifth defendant under s. 22(1)(a) of the Malaysian Act.

I am mindful that in the case of *Toh Hock Thye & Ors. v. Toh Chwee Biow* [1982] 1 MLJ 152 the Federal Court dismissed a suit for want of prosecution and the Court observed, "It will be preposterous to allow this suit to be kept alive on the basis that the appellants have a right to keep the respondents waiting for so long as they like just because the substantive cause of their actions is not subject to a statutoty period of limitation." In that case however the plaintiffs were completely inactive for 5 years 3 months and had given no answer nor any satisfactory explanation when called upon by the High Court to do so. The Federal Court considered that the plaintiffs on the facts of the case were guilty of inordinate and excusable delay if not also of intentional and contumelious delay. In the present case the plaintiffs had not been completely inactive. And they are not guilty of intentional and contumelious delay.

In all the circumstances of the case I would dismiss all 3 applications of the first, second and fifth defendants and would so dismiss them with costs.

Also found at [1988] 1 CLJ 781